UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
FOURTH REGION

UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, AFL-CIO (LOCAL) USW 10-1, Union,	Case No.	04-CA-136562 04-CA-137372 04-CA-138060 04-CA-141264 and 04-CA-141614
DENNIS ROSCOE, An Individual,	Case No.	04-CA-138265

and

WATCO TRANSLOADING, LLC,
Respondent.

RESPONDENT'S RESPONSE TO GENERAL COUNSEL'S
CROSS-EXCEPTIONSTO ADMINISTRATIVE LAW JUDGE'S DECISION

Pursuant to Section 102.46(d) of the Board's Rules and Regulations, Respondent submits the following Answering Brief to the General Counsel's Cross-Exceptions to the Administrative Law Judge's Decision.

I. Introduction

The General Counsel ("GC") filed six cross-exceptions to the Administrative Law Judge's ("ALJ") Decision and Order. The GC excepted to 1) the ALJ's conclusion that Watco did not violate Section 8(a)(1) when Brooke Beasley requested that John Peters not discuss her interview of him with others; 2) the ALJ's purported failure to determine whether Watco, through manager Brian Spiller, unlawfully interrogated employees in early September 2014 regarding union activity; 3) the ALJ's "inadvertent" finding that Watco's issuance of two disciplinary warnings on August 21, 2014 violated Section 8(a)(3)[1]; the ALJ's purported failure to rescind Roscoe's final warning and performance improvement plan; 5) the ALJ's purported

[1] Watco does not oppose the General Counsel's third cross-exception.

failure to determine whether Spiller unlawfully promised employees that he would try to procure heavy gloves and hats; and 6) the ALJ's purported failure to determine whether Spiller unlawfully solicited employee grievances on September 16 or 17, 2014.

II. The ALJ Properly Found That Watco Did Not Violate Section 8(a)(1) By Requesting that John Peters Keep His Interview Confidential.

The ALJ properly found that Watco did not violate Section 8(a)(1) when Brooke Beasley requested that John Peters not discuss her interview of him with anyone. Watco disputes any contention that Beasley "prohibited" anyone from speaking to others about the investigation. Instead, Beasley represented that the company would keep their information confidential and requested that they do so also. As Beasley quite credibly testified:

> Q. Speaking of this representation of confidentiality that you gave the witnesses, in conducting the interviews on August 4th and 5th, what is it that you explained to the witnesses, if anything, relative to confidentiality?
>
> A. I would say to them that we would request that you keep this as confidential as possible, due to this being an open and ongoing investigation.
>
> Q. Okay.
>
> A. And then would also guarantee them that we would keep their information confidential.
>
> Q. So consistent with what you said previously you told them that the Company will keep your statements confidential. We're not going to share this with other people.
>
> A. Right.
>
> Q. Is that a yes?
>
> A. Yes.
>
> Q. And relative to any requests that you made to them your request was you'd ask them to keep it confidential while it was ongoing.
>
> A. Correct.

Q. What is it that you would want them to keep it confidential while it was ongoing?

A. For the integrity of the investigation, we wouldn't want to intentionally or unintentionally skew any memories or facts of the evidence.

Tr. 580:60 to 581:5. There is no evidence that (a) Beasley suggested that there was any disciplinary consequence if employees did not keep the investigation confidential, or (b) the request could be viewed to extend beyond the completion of the investigation.

On these facts, there is no basis to find a violation of the Act. In *Banner Health System*, 362 NLRB No. 137 (June 26, 2015), the Board held that a blanket rule or practice of requesting employees to keep an investigation confidential and where there was a suggestion of disciplinary consequences for not doing so violates employee Section 7 rights. 362 NLRB No. 137, p. 5 (noting that the employer in *Banner Health* used a form that could be viewed as suggesting a disciplinary consequence).[2] In so holding, the Board reaffirmed certain prior precedent indicating that confidentiality requests could be justified for the duration of any ongoing investigation. *Id.* at 6 (citing *Caesar's Palace*, 336 NLRB 271 (2001) (confidentiality rule could be applied to an ongoing investigation where there was risk of a cover-up or retaliation); *Phoenix Transit Systems*, 337 NLRB 510 (2002) (confidentiality rule was unlawful where it applied to closed investigations and the need for confidentiality had expired)). The General Counsel did

[2] Notably, on appeal the District Court for the District Court of Columbia remanded the issue of whether Banner Health's form constituted a categorical request for nondisclosure regarding any kind of investigation because the evidence of record did not support such a determination. *Banner Health Sys. v. Nat'l Labor Relations Bd.*, 851 F.3d 35, 44 (D.C. Cir. 2017). The court noted, "As it stands, the record is devoid of evidence that any employee was aware of the form or the content of its nondisclosure script. Odell's testimony suggested that, despite the header, Banner's policy was not to request nondisclosure in 'all investigations.' But her testimony was simply too terse and unclear to sustain the Board's determination that Banner had a policy of categorically requesting nondisclosure of the entire subset of investigations that addressed 'alleged sexual harassment, hostile work environment claim, charge of abuse, or similar alleged misconduct.'" Similarly here, Beasley was never asked if she requested that any of the eleven other witnesses interviewed keep the interview confidential or if she had a practice of making such requests in every type of investigation. Accordingly, the General Counsel did not elicit evidence to establish that Watco had "a policy of categorically requesting nondisclosure regarding any particular kind of investigation."

not introduce any evidence to show that Watco has a "blanket rule" that all employees are required to keep all investigations confidential. Only Peters testified that Beasley made such an instruction during her investigation. The General Counsel called no other witnesses to corroborate such an alleged prohibition – despite Beasley speaking to eleven (11) other witnesses. Thus, current Board law clearly recognizes that confidentiality is often important to protect the integrity of an ongoing investigation (precisely the rationale used by Beasley to ensure memories are not "intentionally or unintentionally skew[ed]"),[3] so long as the confidentiality rule doesn't apply beyond its necessary usefulness in an ongoing investigation (which is precisely how it was applied here).

Furthermore, to the extent that *Banner Health* is read more broadly to render Beasley's request as violative of Section 8(a)(1) or to otherwise prohibit any rule of confidentiality pertaining to ongoing investigations, then *Banner Health* should be reversed as an unreasonable application of the Act. As articulated by Chairman Miscimarra in his dissent, the majority test articulated in *Banner Health* does not appropriately balance employee Section 7 rights vs. the business justifications for maintaining the confidentiality of workplace investigations. 362 NLRB No. 137, pp. 13-17. Watco incorporates such reasoning by reference.

Moreover, the failure to permit confidentiality rules generally in the context of ongoing investigations, elevates employee Section 7 rights over all other employee rights that are preserved by a reasonable application of confidentiality rules, such as:

- Employee rights to privacy concerning personnel matters.
- Employee rights under federal, state and local laws to be free from sexual and other workplace harassment based on protected characteristics, and the corollary

[3] The very real risk that an individual's recollection of events may change based on conversations with others about those events has been long recognized by psychology researchers. See *Remembering in Conversations: The Social Sharing and Reshaping of Memories*, Annual Review of Psychology pp. 55-79 (Vol.63, January 2012).

right to be able to make complaints of such harassment without fear of wide and unnecessary dissemination of the often demeaning conduct.

- Employee rights to have a fair investigation conducted, whether they are the victim or the accused, without potential witnesses being influenced. Indeed, one imagines an arbitrator, judge or jury finding significant due process issues in any investigation where witnesses compared stories during an ongoing investigation.

The importance of keeping witnesses from talking to one another in order to protect the integrity of the evidence being gathered is every bit as important in a workplace investigation in which jobs and legal rights are on the line as it is in a hearing before an ALJ or a trial before a court – where "the rule" excluding witnesses and prohibiting them from speaking with one another about their testimony is routinely invoked without any special showing of need. There is no logical basis to distinguish between the need to preserve the integrity of evidence in one situation and not the other – another point aptly made by Chairman Miscimarra in his dissent. *Id*. at 18. Accordingly, the ALJ's determination that Watco did not violate the Act by requesting that Peters keep his interview confidential should be upheld.

III. The ALJ Addressed All Allegations of Section 8(a)(1) Violations Regarding Brian Spiller's Meetings with Employees in September 2014.

The General Counsel filed three exceptions asserting that the ALJ did not make a determination as to whether Watco violated Section 8(a)(1) by 1) "unlawfully interrogating" employees about union activity; 2) "unlawfully promis[ing]" employees heavy gloves and hats; and 3) "unlawfully solicited" employee grievances in meetings allegedly held by Brian Spiller in September 2014. Contrary to the General Counsel's argument, in addressing the allegations contained in complaint paragraphs (d), (e), and (f) – which set forth the allegations of solicitation of grievances, interrogation, and promise of giving employees hats and gloves, the ALJ ultimately determined that Watco had violated Section 8(a)(1) of the Act. No further remedy would be granted by making specific determinations on the individual allegations.

To the extent the ALJ failed to make such determinations, the evidence did not establish that Watco engaged in unlawful interrogations or solicitations of grievances and/or violated the Act by providing its employees with hats and gloves.[4] The Board has long addressed alleged unlawful interrogations under the standards set forth in *Blue Flash*, 109 NLRB 591 (1954) and reaffirmed in *Rossmore House*, 269 NLRB 1176 (1984), *aff'd* 760 F.2d 1006 (9th Cir. 1985). Under Board law, "interrogations of employees are not per se unlawful, but must be evaluated under the standard of whether under all the circumstances the interrogation reasonably tended to restrain, coerce, or interfere with rights guaranteed by the Act." *Norton Healthcare, Inc.*, 338 NLRB 320, 320-21 (2002) (internal quotations omitted). To support a finding of illegality, either the words used or the context in which they are said must suggest coercion or interference. *Rossmore House*, 269 NLRB 1176, 1177-78 (1984). Likewise, isolated, sporadic, and innocuous inquiries of a few employees do not constitute unlawful interrogation within the meaning of Section 8(a)(1) of the Act. *Mission Clay Prods. Corp.*, 206 NLRB 280 (1973); *Blue Flash*, 109 NLRB 591, 597 (1954).

The Board applies a "totality of the circumstances" test to determine whether an alleged interrogation is lawful, considering, among other factors, (i) the nature of the information sought, i.e., whether the interrogator appears to have been seeking information on which to base taking action against individual employees; (ii) the identity of the interrogator, i.e., his or her placement in the employer's hierarchy; (iii) the place and method of the interrogation; and (iv) whether the interrogated employees are open and active union supporters. *See Cellco Partnership*, 349 NLRB 640, 653 (2007) (questioning of "an 'open and active' supporter of the Union" concerning

[4] Watco's provision of heavy hats and gloves is no different than its provision of rain gear. As set forth fully in Watco's Brief in Support of Exceptions, incorporated herein by reference, there is no evidence to show that Watco provided appropriate seasonal gear (heavy hats, gloves, rain boots) to employees in an effort to interfere or undermine union activity. *See Field Family Assocs., LLC d/b/a Hampton Inn NY-JFK Airport*, 348 NLRB 16 (2006) ("to find an employer's promise of economic benefits unlawful, the Board must focus on whether the respondent intended to interfere with actual union organizational activity among its employees).

"his union activities, in the absence of threats or promises, does not violate the Act"); *Milum Textile Servs. Co.*, 357 NLRB No. 169 at 33 (2011) (not unlawful for employer to ask open and active union supporters "why they wanted a union" where the "question was posed without animosity or intimidating comment and did not, therefore, tend to restrain, coerce, or interfere with the employees' statutory rights"). The Board has held questioning to be permissible where (i) the employer voiced opposition to unionization, but such statements were free from threats or promises; (ii) the questioner did not appear to be seeking information upon which to take action against any individual employee; and (iii) the questioning was casual and amicable. *John W. Hancock, Jr., Inc.*, 337 NLRB 1223 (2002); *see also Sunnyvale Medical Clinic, Inc.*, 277 NLRB 1217 (1985) (similar).

Here, Watco acknowledges that Spiller was aware that Peters and Roscoe were involved in organizing. As such, Spiller's questions about employee issues did not tend to restrain Peters, Roscoe, or other employees from the exercise of their statutory rights. Peters and Roscoe admit that they were both open and active in distributing authorization cards over the last weekend in August 2014. And there was no evidence that the conversations or meetings in September 2014 were somehow less than amiable or that there was any threat made in connection with any comments. *See Cellco Partnership*, 349 NLRB at 653 (2007) (questioning of "an 'open and active' supporter of the Union" concerning "his union activities, in the absence of threats or promises, does not violate the Act"); *Milum Textile Servs. Co.*, 357 NLRB No. 169 (not unlawful for employer to ask open and active union supporters "why they wanted a union" where the "question was posed without animosity or intimidating comment and did not, therefore, tend to restrain, coerce, or interfere with the employees' statutory rights"); *Hotel Emps. And Restaurant Emps. Union, Local 11 v. NLRB*, 760 F.2d 1006, 1009 (9th Cir. 1985) ("Employers often mingle

with their employees, and union activities are a natural topic of conversation. A standard which considers the totality of the circumstances surrounding an employee interrogation is a realistic approach to the enforcement of section 8(a)(1).”). In fact, Matthew Horne, then a Watco employee, testified that Spiller often had meetings with employees to discuss issues. Tr. at 86:9-17. Horne further testified that Spiller never made any sort of threat to any employee. Tr. at 89:10-14. No witness testified that Spiller offered employees raises or any other changes to the terms and conditions of employment in exchange for refusing to support the Union. Under these circumstances there can be no finding that Watco violated Section 8(a)(1).

IV. The ALJ Ordered All Warnings to be Removed From Dennis Roscoe’s File.

The General Counsel argues that the ALJ failed to order Respondent to rescind the Final Warning and Performance Improvement Plan issued to Roscoe in connection with his suspension. However, the ALJ did order Respondent to remove “any reference to the . . . Dennis Roscoe’s written warnings and suspension.” (ALJD at 19, lines 39-41). Such an order necessarily encompasses the Final Warning and Performance Improvement Plan issued along with Roscoe’s suspension.[5]

V. Conclusion

For the reasons stated above, the ALJ properly found that Watco did not violate Section 8(a)(1) in issuing a confidentiality request to John Peters regarding his interview with Brooke Beasley. The ALJ’s determination in this regard should be upheld. Further, the ALJ determined that Watco violated Section 8(a)(1) when it had meetings with employees in September 2014, to which Watco has filed exceptions. Any specific findings regarding interrogations, promises of

[5] Watco has filed Exceptions to the ALJ’s determination that Watco violated Section 8(a)(3) when it suspended Roscoe as well as the ALJ’s ordered remedy.

hats and gloves, or solicitation of grievances are duplicative and does not warrant any further remedy.

Respectfully submitted,

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CERTIFICATE OF SERVICE

It is certified that a copy of Watco Transloading, LLC's Response to the General Counsel's Cross-Exceptions to Administrative Law Judge's Decision in the above-captioned case has been served by email on the following persons on this 28th day of June, 2017:

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